

**BEFORE THE WORKERS COMPENSATION APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|-----------------------------------|---|----------------------|
| MICHAEL J. PRICE |) | |
| Claimant |) | |
| V. |) | |
| |) | |
| HANDYMAN MATTERS |) | Docket No. 1,064,753 |
| Respondent |) | |
| AND |) | |
| |) | |
| RED ROCK INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Claimant, by and through Joni Franklin of Wichita, requests review of Administrative Law Judge Gary Jones' July 18, 2014 preliminary hearing Order. Elizabeth Dotson of Kansas City appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the transcript of the July 15, 2014 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

This is a new law case involving injury by repetitive trauma. Respondent admitted claimant's bilateral thumb injuries were compensable¹ and provided medical treatment. Claimant sought right shoulder treatment and temporary total disability benefits. The judge ruled claimant failed to prove his alleged repetitive trauma was the prevailing factor in causing his right shoulder injury, medical condition and need for treatment.

Claimant requests reversal, arguing he proved his right shoulder injury arose out of and in the course of his employment and his repetitive work was the prevailing factor in causing his right shoulder injury and need for treatment. Claimant also argues his right shoulder injury is the direct and natural result of his compensable thumb injuries. Respondent maintains the Order should be affirmed.

The issue for this Board Member's review is: did claimant sustain a compensable right shoulder injury?²

¹ See Respondent's Brief at 2.

² The parties dispute timely notice, but the judge did not rule on notice. K.S.A. 2011 Supp. 44-555c(a) limits the Board's review to issues heard and decided by the judge.

FINDINGS OF FACT

Claimant began working for respondent in June 2008. His job duties included constructing and remodeling rooms, plumbing, electrical work, cement and brick work, painting, installing drywall, floors, tile, siding, doors and windows, performing exterior repairs, such as roofing repairs, and landscaping. Claimant performed repetitive activities on a daily basis, such as using drills, hammers, saws and vibratory tools, as well as lifting and carrying materials weighing up to 150 pounds.

According to claimant's testimony, in early October 2011, he began noticing pain in his thumbs, wrists and up through his arms, with the right being worse than the left, in addition to tightness, pulling and pain going up into his right shoulder. Soon after, claimant notified respondent he was experiencing extreme pain in both thumbs and weakness in both hands, but made no mention of his shoulder or any radiating pain.

Claimant was seen by Joshua Umbehr, M.D., his primary care physician, on October 10, 2011. Claimant reported bilateral thumb pain and denied pain going up into his forearm and elbow. He made no reference to a shoulder problem. Claimant told Dr. Umbehr that he previously saw a physician in Derby who diagnosed thumb tendinopathy and provided an injection. Dr. Umbehr believed claimant suffered from either de Quervain's tenosynovitis or MCP joint arthritis and provided conservative treatment.

Claimant was referred to John Babb, M.D. On October 24, 2011, claimant complained of pain in his thumbs which radiated "up his arm."³ Dr. Babb diagnosed claimant with bilateral hand pain, bilateral de Quervain's tenosynovitis and bilateral basilar joint arthritis. Dr. Babb administered injections, prescribed medication and ordered physical therapy. In an October 26, 2011 physical therapy note, claimant reported his "right shoulder does not work as well as the left with decreased [range of motion]."⁴

Conservative treatment failed to provide claimant relief. On December 5, 2011, claimant was referred to Mark Melhorn, M.D.

Claimant was initially seen by Dr. Melhorn on December 15, 2011, at which time he filled out a document titled "H & P Patient Format." Claimant wrote that he had "severe pain in both hands in thumb area. R > L" and his reason for the appointment was severe pain and stiffness in the base of "both thumbs."⁵ Dr. Melhorn's records do not mention a right shoulder injury. Dr. Melhorn diagnosed claimant with bilateral carpometacarpal joint (CMC) osteoarthritis and right de Quervain's.

³ P.H. Trans., Cl. Ex. 2 at 29.

⁴ *Id.*, Cl. Ex. 2 at 24.

⁵ *Id.*, Cl. Ex. 3 at 12.

Dr. Melhorn provided conservative treatment for claimant's thumbs, but claimant reported inadequate relief. According to Dr. Melhorn's January 2, 2012 note, claimant told him he intended to "'work' the workers compensation course as long as possible, and if he does not get relief of his pain, then he plans to quit his job."⁶ Dr. Melhorn did not believe medical management or surgical intervention would make claimant pain free. Claimant wanted a second opinion and Dr. Melhorn agreed a second opinion would be beneficial. As a result, claimant was referred to George Lucas, M.D.

In February 2012, Dr. Lucas operated on claimant's right thumb.

On May 2, 2012, claimant told Dr. Umbehr he had increasing right shoulder pain and that a massage therapist told him earlier that day that he had right shoulder popping and tightness. Claimant had full right shoulder range of motion with tightness and bilateral shoulder stiffness. Dr. Umbehr noted claimant described a long history of tight shoulders.

In July 2012, Dr. Lucas operated on claimant's left thumb. Dr. Lucas released claimant on November 27, 2012, with permanent restrictions.

In an amended application for hearing filed on April 1, 2013, claimant alleged repetitive trauma to his bilateral hands, bilateral wrists, right thumb and right shoulder commencing October 3, 2011, and continuing each and every working day thereafter.

On June 10, 2013, claimant was seen at his attorney's request by George Flutter, M.D. Claimant complained of shoulder/upper back, bilateral forearm and thumb pain, as well as a pulling sensation in his shoulders when lifting. Dr. Flutter noted positive shoulder impingement bilaterally, minimal tenderness to palpation over the acromioclavicular joints, bicipital tendon and subacromial areas of the shoulder, and tenderness in the muscles of the neck, upper back, upper shoulders and scapular stabilizers.

Dr. Flutter diagnosed claimant with bilateral upper extremity pain, bilateral thumb pain, bilateral thumb CMC joint arthrosis, status post right thumb surgery and status post left thumb surgery. In addressing causation and prevailing factor, Dr. Flutter stated:

Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between Mr. Price's current condition and repetitive work-related activities involving the hands.

The prevailing factor for the condition and the need for medical evaluation/treatment is the repetitive work-related activities involving the upper extremities. These activities are over and above those associated with routine activities of daily living.⁷

⁶ *Id.*, Cl. Ex. 3 at 7.

⁷ *Id.*, Cl. Ex. 4 at 4.

On September 5, 2013, the court ordered an independent medical evaluation with Peter Bieri, M.D. Claimant was evaluated by Dr. Bieri on January 21, 2014. Claimant told Dr. Bieri about his repetitive job duties. Claimant complained of marked pain in his right shoulder that was worsened by shoulder-level and overhead use. Claimant indicated his pain occasionally radiated to his neck, but depended on his activity. Dr. Bieri noted claimant had moderate AC joint tenderness, radiating into the biceps and deltoid, as well as decreased strength to resisted flexion, abduction and external rotation. Active range of motion measurements for claimant's right shoulder showed 140° flexion, 40° extension, 150° abduction, 50° adduction, 70° internal rotation and 70° external rotation. In addition to conducting a physical examination, Dr. Bieri reviewed over 300 pages of medical records.

In addressing diagnosis and treatment recommendations, Dr. Bieri stated:

The claimant is firm in his history that he has right shoulder pain, but it is difficult to determine, from records and deposition, exactly when his pain started. He believes it began October 3, 2011, but was superseded by concern regarding both thumbs. He has clinical findings on examination today consistent with rotator cuff tendinitis, or a possible rotator cuff tear. If this is indeed judged to be secondary to the injury in question, which appears to be the case historically, the claimant has undergone no specific diagnostic or treatment interventions. If such is the case, recommendation is made for orthopedic consultation and appropriate radiographic studies of the right shoulder.⁸

At the July 15, 2014 preliminary hearing, claimant testified he told the authorized physicians – Drs. Babb, Melhorn and/or Lucas – about his shoulder problems, but they “were more concentrated on [his] thumbs. Nothing was said or done about the shoulder.”⁹ While Dr. Lucas' records were not placed in evidence, claimant agreed such records would not mention his right shoulder.

The judge's July 18, 2014 preliminary hearing Order states, in part:

The claimant's preliminary hearing requests are considered and denied. The Claimant has failed to establish that the alleged repetitive trauma was the prevailing factor in causing the injury, medical condition and need for treatment for the Claimant's right shoulder problem.¹⁰

Claimant timely appealed the judge's preliminary hearing Order.

⁸ Bieri Report at 6.

⁹ P.H. Trans. at 26-27.

¹⁰ ALJ Order.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) provides:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides, in pertinent part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The secondary injury rule provides that "when a primary injury . . . is shown to have arisen out of and in the course of employment every natural consequence that flows from the injury, including new and distinct injury, is compensable if it is a direct and natural result of a primary injury."¹¹

ANALYSIS

Dr. Fluter provided the only prevailing factor opinion. However, in determining what constitutes the prevailing factor, all relevant evidence must be considered. While the preliminary hearing Order does not state why the judge ruled against claimant, it is likely the judge ruled against claimant because the medical records focus on claimant's bilateral thumb injuries. Records from Drs. Babb and Melhorn and, according to claimant, Dr. Lucas, do not mention claimant having work-related right shoulder pain. The first mention of right shoulder pain is in Dr. Umbehr's May 2, 2012 report. Dr. Umbehr's report does not link claimant's right shoulder pain to his repetitive work, but stated claimant had a long history of tight shoulders.

Claimant having mentioned to Dr. Babb that his thumb pain sometimes went up his arm does not equate to claimant alleging a work-related right shoulder injury. Claimant having told a physical therapist that his right shoulder did not work as well as his left shoulder does not mean claimant injured his right shoulder at work.

The secondary injury rule does not apply. Claimant's right shoulder injury is not the direct and natural result of his thumb injuries. The medical evidence does not support any such link. Claimant's contention is that his right shoulder was injured in October 2011, but ignored by physicians. This Board Member does not interpret Dr. Bieri's report as saying claimant's right shoulder was injured as a secondary result of claimant's thumb injuries. Rather, Dr. Bieri noted claimant's shoulder injury was present all along based on the history provided by claimant. Such conclusion is at odds with the lack of work-related right shoulder complaints in the treatment records.

CONCLUSIONS

Based on all of the relevant evidence, claimant did not prove his work for respondent was the prevailing factor in causing his right shoulder injury, medical condition and need for treatment. Thus, claimant's asserted right shoulder injury by repetitive trauma did not arise out of his employment based on K.S.A. 2011 Supp. 44-508(f)(2)(A)(iii).

¹¹ *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

DECISION

WHEREFORE, the undersigned Board Member affirms the July 18, 2014 Order.¹²

IT IS SO ORDERED.

Dated this _____ day of September, 2014.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Gary Jones

¹² By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.